Supreme Court, U.S.
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No. 91-906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL CASPARI and WILLIAM L. WEBSTER

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether Mr. McIntyre's conviction for stealing an automobile subsequent to a conviction for tampering with the same automobile violated his right not to be twice prosecuted for the same offense under *Brown v. Ohio*.

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Statutes and Rules

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Respondent Terry D. McIntyre respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit granting respondent's application for writ of *habeas corpus*.

STATEMENT OF THE CASE

A. Background

On November 22, 1985 Terry McIntyre took a car belonging to a car dealer. On November 24, he was arrested in the adjacent county while driving the stolen car. He was found guilty in June 1986 after a jury trial on the charge of "tampering" with the vehicle. In August 1986, he was charged with stealing the same car for which he had been convicted of tampering. He was found guilty of stealing the car in February, 1987. He is now serving consecutive prison terms of ten years each, totaling twenty years, for stealing and tampering with the car.[1]

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[1] The Missouri tampering statute provides:

> A person commits the crime of tampering in the first degree if.... He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile without consent of the owner thereof.

§569.080, Mo. Rev. Stat. The Missouri statute for stealing provides:

> A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion...

The jury instructions for tampering in this case were:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Galant, owned by Kirkwood Mitsubishi; and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated knowing that he did so without the consent of the owner,

then you will find the defendant guilty of tampering in the first degree.

The jury instructions in the subsequent stealing case were:

If you find and believe from the evidence beyond a reasonable doubt:

First that on November 22, 1985 . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and

Second, the defendant did so without the consent of Kirkwood Mitsubishi, and

Third, that defendant did so for the purpose of withholding it from the owner permanently, and

Fourth, that the property taken was an automobile,

then you will find the defendant guilty of felony stealing.

Stealing is a class C felony if: The property appropriated consists of: Any motor vehicle, watercraft or aircraft;

§570.030, Mo. Rev. Stat.

B. Proceedings Below

Mr. McIntyre was sentenced for tampering. The Missouri Court of Appeals affirmed the conviction on June 30, 1987, *State v. McIntyre*, 735 S.W.2d 111 (Mo. Ct. App. 1987). He was later charged convicted and sentenced for stealing the car. The conviction was affirmed on February 16, 1988, *State v. McIntyre*, 749 S.W.2d 420 (Mo. Ct. App. 1988). McIntyre then filed a motion for habeas corpus relief on September 2, 1988 in the U.S. District Court for the Eastern District of Missouri. A certificate of probable cause was denied in the district court on October 17, 1989. On May 7, 1990 the Court of Appeals for the Eighth Circuit granted a certificate of probable cause and counsel was appointed. On July 15, 1991 the United States Court of Appeals for the Eighth Circuit issued its opinion granting the writ of *habeas corpus*. Rehearing was denied on September 4, 1991. The State then filed its Petition for Certiorari.

REASONS FOR DENYING THE WRIT

Whether the test of *Blockburger v. United States*, 234 U.S. 299 (1932) or the "same evidence" test of *Grady v. Corbin*, 110 S.Ct. 2084 (1990), is used, the result would be the same. Retroactivity of *Grady* pursuant to *Teague v. Lane*, 109 S.Ct. 1060 (1989), is not necessarily at issue.

McIntyre wins under the test of *Blockburger v. United States*, 234 U.S. 299 (1932) as applied in *Brown v. Ohio*, 432 U.S. 161 (1977). The State used the same evidence at the first trial that it used at the second trial. It proved that McIntyre had the car, and used the testimony of the owner that he had stolen it to get a conviction for tampering. With that conviction in hand, the prosecutor in the next county prosecuted for the theft using the same evidence. Not some of the same evidence, as in *Dowling v. United States*, 493 U.S. 342 (1990), but all of the evidence!

The highest court of Missouri has not determined whether tampering is a lesser included offense of stealing. The Missouri Court of Appeals has distinguished *Brown v. Ohio*, 432 U.S. 161 (1977) at 170 on the basis that *Brown* held that the determination whether the Constitution's double jeopardy rule has been violated is a matter for state determination. *State v. Smith*, 655 S.W.2d 626 (Mo.Ct.App. 1983); *State v. McIntyre*, 749 S.W.2d 420 (Mo.App. 1988). The Missouri Court of Appeals has simply decided to disagree with the Ohio Court of Appeals and says, ignoring the language in *Brown* prohibiting the division of a single crime into a series of temporal or spatial units, that tampering and stealing are separate crimes. The Missouri Supreme Court has not ruled on the double jeopardy aspects of the tampering and stealing convictions in consecutive prosecutions.

The State admitted in its petition for *certiorari* that it tried both cases on the same evidence (P27). The jury instructions for both cases were similar, except that the stealing conviction required the additional

element of intent to permanently deprive the owner of the vehicle.[2] The car was stolen within two days of the joyride.

The right not to be subject to two trials for the same offense is a fundamental right under *Teague v. Lane*, 109 S.Ct. 1060 (1989). This right was defined in *Robinson v. Neil*, 409 U.S. 505, 510 (1973). The Eighth Circuit did not have to find that *Grady v. Corbin* was retroactive in application, since both *Brown* and *Blockburger* compelled its decision. However, the Eighth Circuit was correct in determining that Grady v. Corbin should be retroactive, since the double jeopardy rule deprives the government of the power to punish again in a separate trial for behavior that has already been punished. The result, a finding of double jeopardy, would be the same under *Grady*, *Brown*, *Blockburger* or *ex parte Nielsen*, 131 U.S. 176 (1889).

There is no issue worthy of Constitutional review.

I.

Certiorari should be denied because the Eighth Circuit properly ruled that Respondent's conviction for stealing an automobile for which he had previously been convicted of tampering was double jeopardy under *Brown v. Ohio* and thus no new rule was necessary.

Respondent has been tried twice and is to serve two consecutive ten year terms in prison for tampering with and then stealing the same automobile from a dealer. Serious equal protection problems arise if the convictions in Missouri were to be upheld, while an identical case in Ohio would be violative of double jeopardy. The highest court in

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[2]It is counsel's understanding that the tampering statutes were adopted because the mobility of the automobile made it difficult to prove an intent to permanently deprive the owner of the vehicle.

Missouri has not ruled whether tampering is a lesser included offense of stealing, so this Court is not bound to accept its rulings on this substantive matter. However, this Court is not bound by a state court's interpretation of the Constitution. The Missouri Court of Appeals has simply held that it is not bound by *Brown v. Ohio*. *State v. McIntyre*, 749 S.W.2d 420, 422 n.1 (Mo. Ct. App. 1988)

II.

The double jeopardy clause prohibits a second trial for conduct where the State used the same evidence at both trials proving the same conduct.

Petitioner fails to consider the holding of *Brown v. Ohio*, 432 U.S. 161 (1977) in its second point. Justice Scalia dissenting in *Grady v. Corbin*, 110 S.Ct. 2084, at 2101 stated that "We held that *Blockburger* barred the second prosecution [in Brown]: because joyriding was simply a lesser included offense of auto theft, proof of the latter would 'invariably' require proof of the former."[3] Petitioner spends much time arguing that it could have proven the stealing with other evidence, but it did not, and cannot explain how it could have done so. Respondent was tried twice on the same evidence, the same facts, and the same conduct.

Examination of the statutes establishes that the only additional element to be proven in stealing is the intent to permanently deprive the owner. There is no element in the tampering statute to be proven

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[3]Petitioner ignores this in its discussion on pages 30 though 34 of its Petition.

that is not taken care of in the stealing statute. Thus the test of *Blockburger v. United States*, 234 U.S. 299, 304 (1932) is met: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

This Court has amply decided the proper use of "other crimes" evidence in *Dowling*. This case is not the one to determine that evidence of this crime should not be used as evidence in a subsequent trial for the same crime.

III.

Regardless of the construction of the double jeopardy clause of the Fifth Amendment in *Grady v. Corbin*, Respondent would still have been the victim of a violation of the double jeopardy clause.

Grady v. Corbin, 110 S.Ct. 2084 (1990) was ruled as it was because the test of *Blockburger v. United States*, 234 U.S. 299 (1932) was considered to be inadequate in certain situations. *Grady* builds upon and does not replace *Grady*. The precedent of *Brown v. Ohio*, 432 U.S. 161 (1977) remains viable and absolutely controls this case.

In *Dowling v. United States*, 493 U.S. 342 (1990), the Government used the testimony of a person who had observed the defendant in a similar context and who had testified against him in another prosecution for a robbery at another time and place in a trial for bank robbery. In this case, the State admittedly used all the evidence from one prosecution to get another conviction involving the

same victim, same car, same defendant, and same taking. Reliance on *Dowling* is inappropriate. Nothing would be gained by attempting to use this case to explicate *Dowling*.

Petitioner attempts to excite the Court with threats that multiple jurisdictional prosecutions could be shut down if *Grady* is allowed to stand. *Brown v. Ohio*, 432 U.S. 161 (1977) dealt with cross jurisdictional prosecutions, and decided that this was no justification for the violation of the double jeopardy guarantee.[4] The problem has been addressed satisfactorily, see *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990)

CONCLUSION

Respondent respectfully requests this Court to deny a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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[4]Does driving the vehicle one stole constitute a crime spree?